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Supreme Court, U. S.
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In The

# Supreme Court of the United States

**OCTOBER TERM 1972**

—o—

**No.** .....

—o—

GARY DEAN BITTNER,

*Petitioner,*

vs.

THE STATE OF NEBRASKA,

*Respondent.*

—o—

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

—o—

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

———o———

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Nebraska entered in the above entitled case on April 7, 1972.

———o———

## CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Nebraska entered on April 7, 1972, is printed in Appendix "A" hereto, infra p. 14, and is reported in 188 Neb. 298, — N. W. 2d —, — S. C. J. —.

—o—

## JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on April 7, 1972. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C., 1257 (3). No motion for a rehearing was had and no extensions of time have been sought or granted with regard to filing this petition for a writ of certiorari.

—o—

## QUESTIONS PRESENTED FOR REVIEW

Whether the petitioner was denied confrontation of the witnesses against him and denied the right to cross-examination under and pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States; whether petitioner was denied his right to confrontation of the witnesses against him and his right to cross-examination of such witnesses pursuant to the Sixth and Fourteenth Amendments to the Constitution of the United States where the principal witness against said petitioner invoked her privileges pursuant to Sec-

tion 25-1210, R. R. S. 1943, Reissue of 1964, that provides as follows:

> "Witnesses; answer subjecting to criminal liability; disgracing answer; privilege. When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in Section 25-1214."

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are United States Constitution, Amendments Six and Fourteen, and are found in Appendix "B" infra p. 21.

The Nebraska Statutes involved are Section 25-1210, R. R. S. 1943, Reissue of 1964, and Section 25-1214, R. R. S. 1943, Reissue of 1964, and are found in Appendix "B", infra p. 23.

## STATEMENT OF THE CASE

The petitioner herein was convicted by a jury on the 23rd day of June, 1971, in the District Court in and for Lincoln County, Nebraska of unlawfully possessing a forged instrument. At the time of trial Rachel Ann Williams, an alleged accomplice of the petitioner, testified that she and the petitioner, Gary Dean Bittner, came to

Lincoln County, Nebraska on April 2, 1971, by automobile and that their luggage contained money orders. There was a shirt in one of the items of luggage and the shirt belonged to the petitioner. When the pair first got to North Platte, Nebraska, on the evening of April 2, they went to the Tomahawk filling station. They then went to another small filling station and then to the Skelly filling station where the accomplice, Miss Williams, went into the restaurant and attempted to cash a travelers' money order check. The petitioner remained in the car. After cashing the check the accomplice, Miss Williams, went back to the car and said she gave the money to the petitioner. She then went to the restroom and changed her clothing, and after that the two went to another filling station. They then went to the Safeway Store with the petitioner driving. At the Safeway Store the accomplice went in and tried to cash one of the money orders. The petitioner remained in the car. The accomplice left the Safeway Store and went to the car and thought they had been caught. The petitioner started to drive away and the two were arrested by the Nebraska State Safety Patrol and were taken to the Nebraska State Safety Patrol Building. The witness gave certain statements to the State Patrol inculpatory of the petitioner and exculpatory of herself. During the time of trial, and upon cross-examination of the alleged accomplice, Rachel Ann Williams, relied upon her Fifth Amendment rights to remain silent and said that all the statements she had made prior to the time of trial were untrue and that her statements at the time of trial implicating the petitioner were true.

During the course of the testimony of the principal witness, the accomplice, testified that she and petitioner came to Lincoln County, Nebraska where they attempted to pass checks and were then arrested.

Upon her cross-examination, the accomplice witness, whose court-appointed counsel was present in Court during the time she was testifying, took her Fifth Amendment privileges against self-incrimination and further invoked her rights under Section 25-1210, R. R. S. 1943, Reissue of 1964, with regard to giving testimony which would subject her to possible criminal liability and public abuse and ignominy. During the course of her testimony the witness was removed from the Courtroom during a recess for the purposes of having her cautioned with regard to her constitutional rights against self-incrimination on the chance she could possibly be charged with offenses in counties other than Lincoln County, Nebraska. The Court allowed such a recess and the witness was counseled by her attorney. Upon a resumption of the trial the witness again continued taking her Fifth Amendment privileges and refused to answer questions such as: Where the two parties were going at the time of the commission of the alleged offense; where the two parties were going from North Platte, Lincoln County, Nebraska; questions concerning the route which was taken to North Platte; where they purchased gas and oil and what the witness' occupation was in Omaha, Nebraska where she lived; whether or not the witness was a prostitute; and also any questions concerning activity outside of Lincoln County, Nebraska, were not allowed and the witness was allowed to take her privileges pursuant to the Fifth

Amendment to the Constitution of the United States. The witness further refused to answer questions concerning the time that the parties left Omaha and she did not answer questions as to how she earned her money.

The right to cross-examine was raised by the defense by a motion to compel the witness, Rachel Ann Williams, to answer the questions placed before her on cross-examination on the grounds that by the witness taking her Fifth Amendment privileges the right to confrontation and the right to cross-examination was being denied the defendant (BE 123:21). See Appendix "B-1" infra p. 24. This motion was overruled by the Court and also the defense made an offer-of-proof to the effect that in the event that the witness, Rachel Ann Williams, was allowed to testify in response to questioning concerning her alleged occupation as a prostitute she would answer "yes" and pointed out to the court that the defense would be allowed to go into any matters that relate to the Witness, her veracity, truthfulness, competency as a witness, and again further offered proof on the grounds that the defendant was being denied effective confrontation on cross-examination, all in violation of his constitutional rights (BE 129:19). See Appendix "B-1" infra pp. —. Court-appointed counsel, on behalf of the witness, objected to the offer of proof under the provisions of Nebraska Reissue Revised Statute, Section 25-1210, in that the matter sought to be elicited would tend to render the witness criminally liable or expose her to public ignominy. The objections to the offer-of-proof both by the State and the court-appointed attorney for the witness were sustained.

Also with regard to Exhibit No. 7, allegedly a sweater of the petitioner, admitted at the time of trial, the witness refused to answer questions as to whether or not the petitioner had ever worn the sweater again invoking her Fifth Amendment rights.

All of the assignments of error submitted to the Supreme Court of the State of Nebraska were preserved by the petitioner's motion for a new trial with the trial court and the motion for a new trial prior to appeal was overruled by the trial court.

The petitioner assigned as error on his appeal to the Supreme Court of the State of Nebraska that it was error for the Court to allow Rachel Ann Williams, the accomplice, to give testimony in the case and allow her to invoke her Fifth Amendment rights on cross-examination thereby curtailing the defendant's rights to cross-examination and confrontation of witness. Further, these questions were raised as being violative of the petitioner's Sixth and Fourteenth Amendment Rights under the Constitution of the United States. The assignments of error in the Supreme Court of Nebraska are set forth in Appendix "C", infra p. 27.

———o———

## REASONS FOR GRANTING A WRIT OF CERTIORARI

The federal question concerning the restriction of cross-examination of a prosecution witness was not decided by the Nebraska Supreme Court in accordance with previous holdings of the United States Supreme Court

and, further, the question concerning impeachment on moral grounds has not been directly decided by the United States Supreme Court and a division of opinion on this question exists between the various jurisdictions. To deny impeachment solely on moral grounds or grounds which may be of both a moral and collateral nature, and to deny cross-examination on details surrounding the commission of an alleged crime is to further deny a criminal defendant the right of cross-examination and confrontation under the Sixth and Fourteenth Amendments to the Constitution of the United States.

1. In the Nebraska Supreme Court's opinion, Appendix "A", infra p. 14, the Court sets forth as follows:

> "She (the prosecuting witness) was represented when testifying by a court-appointed attorney and upon his advice refused to answer certain questions propounded on cross-examination on the grounds that the answers would tend to incriminate her. No possible prejudice appears except in regard to the question of whether the witness was a prostitute."

Further, the Court in its opinion at p. 14 sets forth:

> "Defendant insists that his right to confrontation was denied by the restriction of cross-examination in the area above mentioned. We cannot agree. The restrictive questioning dealt only with the collateral matter bearing solely on the credibility of the witness, not upon facts brought out on direct examination and not on facts pertaining to the guilt or innocence of the defendant."

In regard to the cross-examination of the prosecuting witness it appears from the record in this case that the defense attempted to draw from the prosecuting witness certain details leading up to the commission of the alleged

crime and surrounding the commission of the alleged crime and also attempted to elicit certain details about the prosecuting witness' background and personal life primarily with regard to her place of residence, her employment, and how she earned her money. These questions did at one point in the trial settle around whether or not the witness earned her living as a prostitute. However, the cross-examination was twofold: 1. Directed toward details leading up to and surrounding the crime, and 2. With regard to her personal background which, of course, reflects on her credibility and veracity.

The right to cross-examination extends not only to the testimony of the witness as given orally with regard to the offense allegedly committed but also goes to his appearance, background, place of residence, the manner in which he testifies and general demeanor while testifying. Since not only is the testimony of the witness but his entire personality and person presented to the jury then by necessity all of these factors constitute confrontation. In fact, in the instant case the jury was instructed in Instruction No. 15:

> "You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive you should consider * * * 2. Their conduct and demeanor while testifying."

The total instruction as given to the jury is found in Appendix "D", infra p. 28. Further, the Nebraska Supreme Court in dealing with the question of credibility

of the witness and the right to cross-examination said at page 300 of the opinion:

> "As usual, in such cases the record fails to throw any light on the situation of the witness in this respect." (prostitution)

Nowhere in the Sixth Amendment is there provision made that a criminal defender must collaterally attack a witness as to credibility and as to the material aspects of testimony given but the right is given to confrontation and cross-examination.

In regard to the right of cross-examination of prosecuting witnesses, the Supreme Court of the United States said in *Smith v. State of Illinois,* 390 U. S. 129, 19 L. Ed. 956, 88 S. Ct. 748:

> "In the present case there was not, to be sure, a complete denial of all right of cross-examination but the petitioner was denied the right to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false. Yet when the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

The Court said further:

> "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a rea-

> sonable judgment in determining when the subject is exhausted * * *. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. * * *"

Further, the opinion of the Nebraska Supreme Court, at page 300 thereof, sets forth:

> "The courts are divided upon the question of whether or not impeachment on moral grounds is permissible." Citing the case of *State v. Cox,* (Mo.) 352 S. W. 2d 665.

Nebraska follows the rule that impeachment on moral grounds may be undertaken only if the case on its merits involves the question.

It would appear here that since confrontation and cross-examination are integral parts of the Sixth Amendment to the Constitution of the United States as the Court said in the case of *Smith v. Illinois,* supra, citing the case of *Pointer v. Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065:

> "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him. * * *"

Since the various jurisdictions are divided on the question of whether or not a witness may be impeached solely upon moral grounds this question should be reviewed by the United States Supreme Court as a denial of the right to impeach on such grounds would be an undue restriction of the right to cross-examination. Fur-

ther, at page 299 of the opinion of the Nebraska Supreme Court in the instant case, the statement is made:

"* * * that no possible prejudice appears * * *."

We submit to the Court that a showing of prejudice is not necessary and the denial of cross-examination and confrontation in that to deny such in and of itself is prejudice of constitutional magnitude. As the Court said in the case of *Alford v. United States,* 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 218:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test without which the jury cannot fairly appraise them * * *."

Further, the United States Supreme Court said in the case of *Pointer v. Texas,* supra, citing the case of *Brookhart v. Janis,* 384 U. S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245:

> "Even more recently we have repeated that a denial of cross-examination without waiver would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

## CONCLUSION

The petitioner here was not permitted to cross-examine the principal prosecuting witness against him on matters surrounding the commission of the alleged crime and details leading up to the commission of said crime.

Further, he was denied the right to go into the questioning of the chief prosecution witness as to her background, place of employment, and the fashion in which she earned her money. Therefore, he was denied the right to confrontation and cross-examination within the meaning of the Sixth Amendment of the Constitution on appeal of the United States and a Writ of Certiorari should be granted herein.

Respectfully submitted,

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## APPENDIX "A"

### STATE VS. BITTNER

(Filed April 10, 1972, Clerk District Court)

38304 Filed April 7, 1972

1. The Constitutions of Nebraska and most of the United States provide that no person shall be compelled to give evidence against himself of an incriminating nature.

2. By statute, a witness cannot ordinarily be compelled to answer when to do so would expose him to public ignominy.

3. The trial court, in the exercise of a sound discretion, must determine whether a witness' claim of privilege is justifiable.

4. The credibility of a witness in a criminal case cannot be impeached by showing that his reputation for morality is bad, but such an attack must be addressed directly to his reputation for truth and veracity.

5. When chastity is not an issue, evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is admissible for the purpose of impeaching the witness either upon cross-examination or by way of rebuttal; nor can these facts be shown for the purpose of impeachment by evidence as to specific acts or instances.

6. The right to confrontation provided by the Sixth Amendment to the Constitution of the United States is not violated when a witness' claim of privilege re-

stricts cross-examination on collateral matters bearing only on credibility and not on facts brought out on direct examination or pertaining to a defendant's guilt or innocence.

7. Ordinarily the uncorroborated testimony of an accomplice who has been guilty of a conscious falsehood may sustain a conviction if a proper cautionary instruction is given.

8. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion.

Heard before White C. J., Spencer, Boslaugh, Smith, McCown, Newton, and Clinton, JJ.

NEWTON, J.

The defendant was convicted of possession of a forged instrument. He was sentenced to serve not less than 2 nor more than 4 years in the Nebraska Penal and Correctional Complex and to pay a fine of $250 and costs. On appeal defendant presents three assignments of error, namely: Prejudicial restriction of his right to cross-examine the State's principal witness; conviction on the uncorroborated testimony of an accomplice; and the imposition of an excessive sentence. We affirm the judgment of the district court.

The defendant and one Rachel Ann Williams had driven from Omaha, Nebraska, to North Platte, Nebraska, where she cashed one forged instrument and where they were apprehended when she tried to cash another. The witness pled guilty to a similar charge but had not been sentenced at the time of defendant's trial. She was rep-

resented, when testifying, by a court-appointed attorney and upon his advice, refused to answer certain questions propounded on cross-examination on the ground that the answers would tend to incriminate her. No possible prejudice appears except in regard to the question of whether the witness was a prostitute. Objection to the question and witness' claim to privilege was based upon Article I, section 12, Constitution of Nebraska, and upon section 25-1210, R. R. S., 1943. Both provide that a witness cannot be required to incriminate himself and the cited statute further provides that a witness cannot be compelled to answer when to do so would "expose him to public ignominy." Although generally forbidden by city ordinance, to be a prostitute or to engage in prostitution, does not constitute a crime under state or federal law. This being true, it is difficult to see how answering the question would tend to incriminate the witness unless she had been guilty of some sexual offense, such as adultery, where, in the event of prosecution, such an admission might be damaging. As usual in such cases, the record fails to throw any light on the situation of the witness in this respect. In *Hoffman v. United States,* 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118, it is said: "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, * * * and to require him to answer if 'it clearly appears to the court that he is mistaken.'" It was further held that the guarantee against compulsory self-incrimination "must be accorded liberal construction in favor of the

right it was intended to secure." On the record before us, this court cannot say that the trial court was guilty of an abuse of discretion. It is entirely possible that such an admission could constitute a link in a chain of evidence required to convict her of some other offense.

The courts are divided upon the question of whether or not impeachment on moral grounds is permissible. In *State v. Cox* (Mo.), 352 S. W. 2d 665, a prosecution for murder, defendant asked a prosecution witness if she was a prostitute and an objection to the question was sustained. The court stated: "The credibility of a witness in a criminal case cannot be impeached by showing that his reputation for morality is bad, but such an attack must be addressed directly to his reputation for truth and veracity." Of similar import are *People v. Vatek,* 71 Cal. App. 453, 236 P. 163; *People v. Brown,* 136 Cal. App. 2d 244, 288 P. 2d 984; *State v. Gress,* 250 Minn. 337, 84 N. W. 2d 616; *State v. Peele,* 67 Wash. 2d 893, 410 P. 2d 599. Generally speaking Nebraska follows this rule and it has been promulgated by statute. See § 25-1210, R. R. S. 1943.

In *Pricer v. Lincoln Gas & Electric Light Co.,* 111 Neb. 209, 196 N. W. 150, it was held: " 'When the matter sought to be elicited would tend to render him (the witness) criminally liable, or to expose him to public ignominy, he is not compelled to answer, * * *.' "

In *Daggett v. State,* 114 Neb. 238, 206 N. W. 735, it was held: "Evidence of general reputation that a female witness is, or has been, not law-abiding, unchaste, or a prostitute, is inadmissible for the purpose of impeaching the witness either upon cross-examination or by way

of rebuttal; nor can these facts be shown for the purpose of impeachment by evidence as to specific acts or instances."

In *State v. Wilson,* 174 Neb. 86, 115 N. W. 2d 794, it was held: "Evidence which does not tend to impeach any witness on a material point and which is not substantive proof of any fact relative to the issue is properly excluded." See, also, *Swogger v. State,* 116 Neb. 563, 218 N. W. 416.

There is a recognized exception to the Nebraska rule in cases involving sexual offenses where chastity is an issue. See *Redmon v. State,* 150 Neb. 62, 33 N. W. 2d 349.

Defendant insists that his right to confrontation was denied by the restriction of cross-examination in the area above mentioned. We cannot agree. The restricted questioning dealt only with a collateral matter bearing solely on the credibility of the witness, not upon facts brought out on direct examination, and not on facts pertaining to the guilt or innocence of the defendant. In *United States v. Cardillo,* 316 F. 2d 606 (2d Cir., 1963), and in *Smith v. United States,* 331 F. 2d 265 (8th Cir., 1964), cert. den., 379 U. S. 824, it is stated: "'* * * reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the

assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him."

From a practical standpoint, it is difficult to see how prejudice could result in the present instance.

Defendant protests that his conviction is dependent upon the uncorroborated evidence of an accomplice who had previously given false or contradictory statements. Examination of the statements previously given discloses a complete lack of any false or contradictory statement. The witness is corroborated in part. The evidence of others discloses that defendant was driving the automobile when a stop was made at a filling station and a forged money order cashed by the accomplice. Also, a stop was then made at a Safeway Store where an attempt was made to cash a second forged money order and on being refused, the accomplice ran to the automobile, spoke to the defendant, and he attempted to hastily drive away. The present rule in this state governing situations of this character may be found in *Smith v. State*, 169 Neb. 199, 99 N. W. 2d 8, and *Rains v. State*, 173 Neb. 586, 114 N. W. 2d 399, cert. den., 371 U. S. 967, 83 S. Ct. 549, 9 L. Ed. 2d 538, wherein it is stated: " 'The fact that an accomplice has been guilty of wilful false swearing on a material matter is a circumstance that may possibly in a particular instance and situation, make his testimony unworthy of

belief on its face, if it lacks corroboration. In the ordinary case, even though the accomplice may have been guilty of a conscious falsehood on a material matter, and even though his testimony is lacking in corroboration, it may not be utterly unworthy of belief on its face, and, in such a situation, the rights of an accused will be adequately protected if the jury are instructed that the testimony of an accomplice should be scrutinized closely for possible motives for falsification, and that where he has wilfully sworn falsely in regard to a material matter they should be hesitant to convict upon his testimony, without corroboration, and that in no case should they convict unless they are satisfied from the evidence, beyond a reasonable doubt, of the guilt of the accused.' " See, also, *Jahnke v. State,* on rehearing, 68 Neb. 181, 104 N. W. 154. Such instruction was given.

In regard to the contention that the sentence is excessive, the record discloses that although this was defendant's first felony conviction, he had been convicted of a great many misdemeanors and had, on two occasions, spent quite a little time in the county jail. Where a sentence has been imposed within statutory limits, it will not be disturbed in the absence of an abuse of discretion. See *State v. Gamron,* 186 Neb. 249, 182 N. W. 2d 425.

The judgment of the district court is affirmed.

AFFIRMED.

THE STATE OF NEBRASKA, ss.

*I, George H. Turner, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that I have com-*

*pared the foregoing copy of an opinion filed by said Court on the 7th day of April 1972 with the original on file in my office and that the same is a correct transcript thereof, and of the whole of said original.*

*IN TESTIMONY WHEREOF, I have hereunto set my hand and caused to be affixed the Seal of said Court, at the City of Lincoln, this 7th day of April, 1972.*

/s/ George H. Turner, Clerk.

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## APPENDIX "B"

### Constitution

### Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

### Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same,

or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**R. R. S. 1210**

Witnesses; answer subjecting to criminal liability; disgracing answer; privilege. When the matter sought to be elicited would tend to render the witness criminally liable, or to expose him to public ignominy, he is not compelled to answer, except as provided in section 25-1214.

**R. R. S. 1214**

Previous conviction of felony; how proved. A witness may be interrogated as to his previous conviction for a felony, but no other proof of such conviction is competent except the record thereof.

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## APPENDIX "B-1"

### BE 123:21-25; 124:1-18

MR. VYHNALEK: Your Honor, at this time the defense moves the Court to compel the witness to answer the questions placed before her on cross-examination on the grounds that this witness has previously given in this case testimony which tends to show the commission or the alleged commission of an offense by Gary Dean Bittner, the defendant; that the defendant, Gary Dean Bittner has the right under the Constitution of the United States to be confronted by all witnesses against him and to cross-examine the witnesses against him; that by this witness taking the Fifth Amendment privilege and her privilege under the Constitution of the State of Nebraska, the right to confrontation and the right to cross-examination is effectively being denied this defendant. And the defense at this time moves to strike all the testimony of Rachel Ann Williams previously given in this case; and further, request the Court to instruct the jury to completely disregard any of the testimony which Rachel Ann Williams gave in this case.

### BE 129:19-25; 130:1-19

MR. VYHNALEK: At this time the defense makes an offer-of-proof to the effect that in the event that the witness, Rachel Ann Williams, was allowed to testify in response to the question about being a prostitute, she would answer "Yes". And further, the defense sets forth to the Court on cross-examination we are entitled to go into any matters that relate to the witness, her

veracity, truthfulness, competency as a witness. And on the further grounds, again, that we are being denied effective confrontation on cross-examination of this witness, all in violation of the Constitution.

MR. SCRITSMIER: On behalf of the witness, I object to the offer-of-proof under the provisions of the Nebraska Revised Statutes, Section 25-1210, which provides that when the matters sought to be elicited would tend to render the witness criminally liable or expose him to public ignominy, he is not required to answer. And I object to the offer-of-proof on that basis.

MR. MULLIKIN: And the State objects to the offer-of-proof for the reason that the offer-of-proof is outside the scope of the direct examination; and is immaterial and irrelevant to the cause in hearing.

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## APPENDIX "C"

### Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Respresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an execu-

tive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**Assignment of Errors**

1. It was error for the Court to allow Rachel Ann Williams, an alleged accomplice, to give testimony in the case at bar and allowing the said Rachel Ann Williams upon cross-examination to invoke the Fifth Amendment rights thereby curtailing the defendant's rights to cross-examination and the confrontation of the witness.

2. The Court erred in overruling the motion of the defendant for an acquittal or directed verdict at the close of the State's evidence.

3. The Court erred in overruling the motion of the defendant for an acquittal or in the alternative a directed verdict at the close of all of the evidence.

4. It was error for the Court to overrule the motion of the defendant for an acquittal or in the alternative for a directed verdict at the close of the evidence on the grounds that the State of Nebraska did not corroborate the testimony of the alleged accomplice, Rachel Ann Williams, and that the said Rachel Ann Williams was allowed to invoke the Fifth Amendment rights upon cross-examination.

5. The sentence imposed by the trial Court was excessive.

6. The verdict was contrary to the law and the evidence.

## APPENDIX "D"

### Instruction No. 15

You are the sole judges of the credibility of the witnesses and the weight to be given to their testimony. In determining the weight which the testimony of the witnesses is entitled to receive, you should consider:

1. Their interest in the result of the suit, if any;
2. Their conduct and demeanor while testifying;
3. Their apparent fairness or bias or relationship to the parties, if any such appears;
4. Their opportunity for seeing or knowing the things about which they have testified;

5. Their ability to remember and relate accurately the occurrences referred to in their evidence;

6. The extent to which they are corroborated, if at all, by circumstances or the testimony of credible witnesses;

7. The reasonableness or unreasonableness of their statements;

8. And, all other evidence, facts and circumstances proved tending to corroborate or contradict such witnesses.